UNITED NATIONS

AT

Administrative Tribunal

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AT/DEC/755
17 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 755

Case No. 838: CHEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Muh-Shing Chen, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 May 1995;

Whereas, on 31 January 1995, the Applicant filed an application requesting the Tribunal, inter alia:

"[To order]

... that the unanimous advice of the Geneva JDC [Joint Disciplinary Committee] be accepted and implemented by the Secretary-General as from 14 September 1994.

...

... compensation to be paid from 14 December 1993 through 2 December 1994 totalling 11 months and 19 days using the salary scale in this period for the injury sustained in being obliged to remain in Geneva, ...

... that 244 days compensation be paid using the salary scale in this period for the injury sustained in being obliged to remain in Geneva, a very expensive city, [for procedural delay].

...

... that 135 days compensation be paid using the salary scale in this period for the injury sustained in being

obliged to remain in Geneva, [be ause of the delay caused by the unavailability of the members of the Geneva JDC]."

Whereas, the Respondent filed his answer on 7 July 1995;

Whereas, the Applicant filed written observations on 10 November 1995;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations Office in Geneva on 19 February 1976, as a Calligrapher Typist at the G-3 level. After serving on a series of short-term and fixed-term appointments, he was granted a probationary appointment on 1 July 1985, having been promoted to the G-4 level, on 1 April 1982. On 1 July 1986, his appointment became permanent. From 14 May 1989 to 30 April 1990, the Applicant was assigned to Namibia, in the Building Management Unit. On 12 July 1992, he was assigned to the United Nations Transitional Authority in Cambodia (UNTAC), initially in the Building Management Service, as a Procurement Assistant. From March 1993, he served in the Contracts Unit.

In late June or early July 1993, the Manager of the Sangker Hotel in Phnom Phen accused the Applicant of abusing his functions and extorting money from UN contractors. An investigation was conducted, and, on 23 July 1993, the Chief Security Officer submitted a report on the investigation to the Officer-in-Charge of Administration. He noted that the Applicant "admitted that he has, at least on two occasions, taken money from the manager of the Orchidee Hotel". With regard to the accusation concerning the Sangker Hotel, he stated "there is no final proof whether or not [the Applicant] has in fact received any money from the manager. All evidence gathered by the investigator, however, makes it very likely that he did".

On 28 July 1993, the Director of Administration, UNTAC, transmitted a copy of the investigation report to the Applicant and informed him "you are hereby charged with misuse of office and abuse of functions in order to enrich yourself ..." He requested the

Applicant's comments and explanations on the allegations no later than 2 August 1993. He also informed the Applicant that, in view of the seriousness of the allegations, "the Secretary-General has decided to suspend you from duty with pay under staff rule 110.2 (a), effective immediately, without prejudice to your rights."

On 6 August 1993, the Applicant submitted his response to the allegations. He explained that he had negotiated various reductions of the daily hotel rates for UNTAC personnel with Chinese managers who kept offering him money to stop the negotiations on price reductions, appealing to his own loyalty as a Chinese person, and also threatened him if he would not do so. The Applicant stated that the allegation of the manager of the Hotel Sangker that he had accepted money from him was false, that, in fact, what had happened was that he had been offered a bribe and had refused it. With regard to the Orchidee Hotel, the Applicant stated that the hotel had overcharged, and that he had been negotiating with the manager to correct the mistake. The manager threatened him on various occasions and consequently, on two occasions, he accepted an envelope containing 500 dollars.

On 10 September 1993, the Director of Personnel, Office of Human Resources Management, informed the Applicant as follows:

> "I regret to inform you that the Secretary-General has decided that you be summarily dismissed for serious misconduct, in accordance with the second paragraph of United Nations staff regulation 10.2.
>
> The Secretary-General's decision is based on his findings that you accepted bribes from a UN contractor, thus misusing your office and abusing your functions, and that your conduct violated staff regulation 1.1 and the terms of your Oath of Office which required you to regulate your conduct with the interests of the Organization only in view. The Secretary-General also found that your conduct violated staff regulation 1.4 which required you to refrain from engaging in activities incompatible with the proper discharge of your duties, and was of a nature such as to bring discredit upon the Organization.
>
> The Secretary-General has concluded that your conduct was inconsistent with the standards of conduct expected of

international civil servants and that the seriousness of the misconduct warrants immediate separation from service."

On 14 October 1993, the Applicant requested the Secretary-General to review the decision to summarily dismiss him. This request was transmitted to the Joint Disciplinary Committee (JDC) which adopted its report on 29 August 1994. Its recommendations read as follows:

"V - RECOMMENDATIONS

85. For the Committee it was clear that there was a grave violation of staff rules, regulations and the Oath of Office. However, the factual circumstances of the case had to be taken into consideration. The Committee found no aggravating factors, but ... it identified several mitigating factors.

86. While the Committee was very concerned by the fact that Mr. Chen did not take action informing his supervisors of the incident, it recognized that he was under great stress, due to the threats received, and that he had been operating in a working environment with little effective supervision. The Panel also noted that this situation was made more difficult by his evident difficulties to communicate in English.

87. In view of the foregoing, the Committee would like to recommend that the disciplinary measure be modified in light of its findings as reported above. The Committee is of the opinion that Mr. Chen should be severely punished considering the seriousness of his conduct, but that mitigating factors should also be considered in order to decide upon a fair punishment. The Committee considered at length the adequate disciplinary measures in the present case. It came to the conclusion that a long period of suspension without pay would be a sufficiently serious and adequate measure, demonstrating the will of the Organization not to tolerate corruption on the part of its staff members, but also taking into account the organizational and administrative aspects of the present case. Therefore, the Committee recommends that Mr. Chen be reinstated and subsequently suspended for a period of one year without pay starting retroactively on the date of his dismissal, i.e. 14 September 1993. The Committee further recommends that the staff member be no longer assigned duties related to financial matters within the Organization, nor sent again on a mission assignment.

Special Remarks

89. Even though not within its immediate purview, the Committee would like to recommend that in the future, when deciding on mission assignments, especially in sensitive mission areas, the Administration be particularly careful in its choices of field personnel. For example, it should ascertain whether in light of the staff member's regular duties and experience he would fit the requirements of the concerned assignment, and not solely on technical grounds. More generally, the Committee thinks that missions, although necessarily encompassing a part of improvisation, should be prepared to correctly use the competence of staff members and thus to facilitate the implementation of the mission. Indeed, the Committee was of the opinion that had Mr. Chen been assigned more adequate functions and supervision, this whole case may never have come about."

On 16 November 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and informed him, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Committee's report. He has taken note of the Committee's findings that you had, as charged, accepted $1,000 in April 1993 from a United Nations contractor thereby committing a grave violation of the rules and principles of the United Nations; and that your fundamental rights of defence and due process had been respected and conformed with the provisions of administrative instruction ST/AI/371. The Secretary-General has noted that you had returned the amount of bribe plus $50 interest to the contractor in June 1993. However, in the absence of action to do so in a more timely manner on your part demonstrated, at a minimum, poor judgement. Given, therefore, the seriousness of your misconduct, the Secretary-General cannot accept the Committee's recommendation that you be reinstated.

The Secretary-General has, nevertheless, taken note of the Committee's view that while the facts in the case are not in dispute, each disciplinary case warrants close examination to ensure equitable justice. The Secretary-General has given careful consideration to the Committee's evaluation of the circumstances in your case, in particular:

- the organizational weaknesses at UNTAC and the frequent absence of a supervisor to whom you could report corruption activities and irregularities as evidenced by testimony contained in the Committee's report;

- prevailing local business and bribery practices;

- difficult working conditions involving threats to your personal safety in your efforts to fight corruption;

- your willingness to return the $1,000 bribe to its author; and,

- your otherwise unblemished 17 years of service and positive attitude towards your work which has saved $4,000,000 to the Organization according to your supervisors' report.

After giving careful consideration to the extenuating circumstances in your case that are set out in the JDC report, and having regard to your prior record of service, the Secretary-General has decided to separate you from service as of 14 September 1993 with payment of three months salary in lieu of notice.

..."

On 31 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant has saved millions of dollars for the United Nations during his career. The United Nations should recognize and appreciate this contribution. He was placed in a job beyond his training and level and not provided with appropriate protection from threats, despite requests to his supervisors.

2. The Respondent's accusation of extortion is libelous. The fact that the Applicant accepted money from a vendor does not mean that he committed an act of extortion, which involves a threat, intimidation, or menace for the purpose of exacting gain.

3. The Applicant should be compensated for procedural delay. The staff rules provide time limits which were exceeded by the Respondent.

Whereas the Respondent's principal contentions are:

1. The Charter and the United Nations Staff Regulations require that staff meet the highest standards of integrity. The

Secretary-General has the responsibility to ensure that these standards are maintained.

2. The Applicant's dismissal was preceded by a fair hearing which fully respected his due process rights. Any delay which occurred was not of such a nature as to affect due process or to entitle the Applicant to compensation.

The Tribunal, having deliberated from 9 to 17 July 1996, now pronounces the following judgement:

I. While the Applicant concedes that he accepted money from a hotel manager, with whom he was negotiating rate reductions, he contends that he did so because he had been threatened by the manager and had been subjected to great pressure. The Applicant had been criticised and felt intimidated by members of the UNTAC military forces, whose hotel rates he was negotiating, as well as by hotel managers. According to the record, he had requested reassignment to another job within UNTAC but was encouraged to continue, because, in the view of a senior UNTAC official, he was the only staff member capable of doing the job.

The Applicant had been warned by the UNTAC Chief of Administrative Services to be wary, as he was upsetting many people. The record suggests that the Applicant's efforts to reduce hotel rates were conducted on his own initiative and in the midst of widespread corruption and collusion between UNTAC military forces and hotel management. The record further suggests that the Applicant had little support from the Administration for his persistence in negotiating rate reductions in the face of continuing threats against him.

II. The Applicant maintains that he was forced to accept the money under threat of violence or death. He further maintains that the short period of five days afforded him, to respond to the allegations against him, was contrary to due process, and that the

procedure was too rapid to allow the Secretary-General to collect all pertinent documents and to assess the case properly. He also contends that the penalty was disproportionate.

III. The Tribunal finds that any disadvantage as to time constraints to which the Applicant may initially have been subjected was rectified by the full and thorough investigation carried out subsequently by the Joint Disciplinary Committee (JDC).

IV. The JDC heard evidence that the Applicant was under pressure, and that he received threats that were serious enough to warrant the granting of temporary protection to the Applicant. There was evidence that the Applicant was genuinely frightened. The JDC also found that UNTAC suffered from "organizational weaknesses that had effects on the line of hierarchical supervision", and that the Applicant was operating at too high a level of responsibility, performing a job for which he had not been properly trained. With regard to the threats he had received and his request to be reassigned, the JDC found it "unacceptable" that the Applicant did not receive the necessary support from his supervisors.

The JDC also heard evidence that the Applicant was a valuable staff member, that he was most honest, and that he had gone to great lengths to save money for the United Nations, in Cambodia and on prior mission assignments. Indeed, the Applicant had helped in exposing corruption, and it was, therefore, incomprehensible that he would have accepted a bribe. The only explanation for it was that he was frightened and under too much pressure.

V. The JDC expressed its concern that the Applicant did not inform his supervisors of the incident. The Applicant's explanation is that he was terrified and that he had been warned by the hotel manager to keep quiet. In the light of the circumstances which emerge from the record, namely the lack of interest in and support for the Applicant's efforts to increase savings and the apparent hostility towards him from UNTAC military forces, the Tribunal finds

the Applicant's explanation reasonable. The Applicant may well have thought that if he informed his supervisors, he would have been in greater danger.

VI. The Respondent argues that his power to dismiss staff for misconduct derives from his responsibility under the Charter to recruit staff of the highest standards of efficiency, competence and integrity and, correlatively, to terminate their appointments when these standards are not met.

The Respondent contends that his decision to separate the Applicant from service was taken after full consideration of the views of the JDC, but that given the seriousness of the misconduct, he could not accept the JDC's recommendation of reinstatement. He did note the extenuating circumstances set forth in the JDC report and accordingly decided to convert the summary dismissal of the Applicant into separation from service, giving the Applicant three months' salary in lieu of notice.

VII. In reviewing the Respondent's decision, the Tribunal finds it of central importance that the Applicant was placed in a working environment for which he was ill-prepared, where supervision and guidance were inadequate and in which he was under constant pressure and in great fear. He was placed in this situation by the Organization and it must, therefore, bear some of the responsibility for what occurred.

VIII. The taking of money must be viewed as a very serious offence. However, in the circumstances of this case, the Tribunal questions whether the Applicant, in any real sense, can be described as having been a free agent or whether, in fact, as he claims, he was forced to accept the money on threat of violence. It would appear that the Respondent, in making his decision, did not take sufficient cognizance of circumstances, which were of such a nature that the JDC remarked that "had [the Applicant] been assigned more adequate functions and supervision, this whole case may never have come

about". The Tribunal shares this view, and considering that the Applicant had been, throughout his career, a good and honest staff member, concludes that the penalty imposed on the Applicant by the Respondent was disproportionate to his behaviour. It may well have been the Applicant's insistent determination to lower costs and save money, a laudable goal, that put him in the situation which resulted in his separation from service. In the light of the Administration's failure to provide adequate support to the Applicant, this was a most unjust outcome.

IX. For the foregoing reasons, the Tribunal finds that the Applicant is entitled to compensation.

Accordingly, the Tribunal orders the Respondent to pay the Applicant one year of his net base salary at the rate in effect on the date of his separation from service, in addition to the three months of termination indemnity he has already received, in lieu of notice.

The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
President

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

Geneva, 17 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

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Distr.
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AT/DEC/756
16 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 756

Case No. 830: OBIMBA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 12 July and 16 September 1994, Godwin Obimba, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 9 December 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to order:

> "... the revocation of the letter for my separation from service due to the recommendation of the Joint Disciplinary Committee constituted to investigate my alleged involvement in the loss of Toyota spare parts from the store.
>
> ..."

Whereas the Respondent filed his answer on 3 August 1995;

Whereas the Applicant filed written observations on 9 October 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 May 1989, as a Driver at the GS-2, step I level, on a three-month fixed-term

appointment at the Kaduna Office in Nigeria. He served thereafter on a series of fixed-term appointments, the last one expiring on 30 April 1994. The Applicant was dismissed for misconduct, with effect from the same date.

In a memorandum dated 30 April 1993, the Zonal Programme Officer at the UNICEF Office in Kaduna, wrote to the Chief of Operations in Lagos, concerning the theft of six cartons of vehicle spare parts. He attached a report of an investigation he had conducted with a Programme Officer and an Administrative/Finance Officer.

The investigation report noted that a Security Guard had "noticed suspicious movement" of the Secretary of the Administration and Finance Unit (the Secretary) and the Applicant, who was the driver of the vehicle which left the office premises after loading cartons from the store. The report concluded that the Secretary had "been involved in stealing office property" and recommended that he be dismissed with immediate effect.

The Applicant, in a statement made for the investigation, reported that he had been asked by the Secretary to help him transport cartons from the store to the Secretary's house on two occasions. He had asked what was in the cartons but was told not to question a superior officer. The Applicant was asked to repeat his statement in front of the Secretary, who denied any involvement.

On 3 September 1993, the UNICEF Representative in Lagos informed the staff that he had established an ad hoc disciplinary committee (ad hoc JDC) to investigate the loss of spare parts and mectizan medicine tablets in the Kaduna Office. The ad hoc JDC submitted its report to the Representative on 24 September 1993. It concluded that the Secretary of the Administration and Finance Unit, Kaduna, was "the number one suspect" in the theft of spare parts and recommended his summary dismissal.

In its report, the committee noted that the Applicant "did not appear in front of the committee despite the special message

sent to him by the office." The report indicates that the Applicant was on annual leave when the office sent this message and that he "only reported to the office on 22 September three days after his official resuming date, stating that his wife is seriously ill." In its conclusions, the committee cited the Applicant as "an accomplice" and recommended his summary dismissal. The committee did not reach a conclusion on the theft of the medicine.

In a letter dated 12 April 1994, the Deputy Executive Director (Operations) transmitted to the Applicant an excerpt of the committee's report pertaining to him, noting from its findings and supporting documentation:

> "(a) That you admitted to using UNICEF vehicle to transport cartons out of the premises with [... X],
>
> (b) That you gave contradictory statements claiming that you connived with [... Y] to frame [... X] for the theft,
>
> (c) That you illegally removed UNICEF inventory records from the Finance Section,
>
> (d) That you refused to appear in front of the Committee despite a message sent to you."

She further informed the Applicant as follows:

> "On the basis of all the evidence presented, I have decided, on behalf of the Executive Director, to accept the recommendation of the JDC [Joint Disciplinary Committee] that you be separated from service in accordance with Staff Regulation 10.2 and Staff Rule 110.3 (vii). Your separation date will be effective upon the expiration of your fixed-term appointment, which will be c.o.b. [close of business] 30 April 1994."

On 25 April 1994, the Applicant appealed the decision and requested further review. On 21 June 1994, the Director, Division of Personnel, replied that the decision was final.

On 9 December 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant could not disobey the instructions of a more senior staff member and was therefore obliged to transport the cartons and retrieve documents as directed.

2. The Applicant was unable to appear before the ad hoc committee because of his wife's ill-health.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determinations of what constitutes misconduct warranting dismissal. The Secretary-General's decision to dismiss the Applicant was a valid exercise of that discretionary authority.

2. The Applicant's dismissal was preceded by an investigation which afforded him a reasonable opportunity to present his version of events.

The Tribunal, having deliberated from 12 to 16 July 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General to dismiss him summarily, pursuant to a recommendation by an ad hoc Joint Disciplinary Committee (ad hoc JDC). The Applicant was charged as an accomplice to the theft of six cartons containing spare auto parts from the UNICEF Office at Kaduna, Nigeria. The Respondent established an ad hoc JDC after a preliminary enquiry had found that the Secretary of the Administrative and Finance Unit had been involved in "stealing office property". He was suspended in May 1992. The ad hoc JDC found, inter alia, that the Applicant, a driver, was an accomplice to the theft and recommended his "summary dismissal for misconduct, illegal use of UNICEF vehicle, theft of documents and insubordination."

The ad hoc JDC found several deficiencies in the management, supervision and control of the UNICEF's stores at Kaduna and recommended several measures for improvement.

II. The Applicant contends that he has been improperly and unjustly accused of being an accomplice to the theft of motor car supplies. He further pleads that allegations against him of illegal use of UNICEF vehicles, of theft of documents and of insubordination are all ill-founded and based on an improper analysis by the ad hoc JDC and by the Respondent. He further alleges that his dismissal was predetermined by the Respondent. Therefore, the investigation by the ad hoc JDC was no more than a pretence. The Tribunal finds no evidence to support this allegation and therefore rejects it.

In fact, the Tribunal finds that the ad hoc JDC carefully examined all the evidence before it and questioned many witnesses before reaching its conclusions. The Tribunal finds that the conclusions by the ad hoc JDC are supported by the evidence.

III. The Tribunal notes the Applicant's contention that, as a driver, he was merely carrying out the orders of his superior. This contention cannot be sustained in the context of a theft. There is nothing to show that the Applicant reported any of these activities to the appropriate authorities, as he should have done.

IV. The Tribunal further notes the contradictory statements made by the Applicant regarding his attempts to inculpate the Secretary. These contradictions only undermine the Applicant's credibility.

Lastly, while the Applicant's failure to appear before the ad hoc JDC, when summoned, may have been justified by his circumstances as he claims, the Tribunal notes that the ad hoc JDC did consider the Applicant's testimony subsequently.

The Tribunal finds that no new evidence has been presented to it. It finds no reason to disagree with any of the conclusions reached by the ad hoc JDC.

V. The Tribunal generally accepts that the Respondent has wide discretion in disciplinary cases and it will not intervene unless its exercise is vitiated by bias or prejudice or other extraneous factors, or tainted by lack of due process. The Tribunal does not find any such flaws in the present case. Further, the Tribunal does not find that the sanction imposed by the Respondent is disproportionate to the offence with which the Applicant was charged.

VI. In the light of the above considerations, the application is rejected in its entirety.

(Signatures)

Samar SEN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 16 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary